No. 50337-9-II

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON DIVISION II

State of Washington,

Respondent,

v.

Adonis Brown,

Appellant

REPLY BRIEF OF ADONIS BROWN

Appeal from Pierce County Superior Court, 15-1-04860-2

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Introduction

The government pins its hopes on a procedural issue: may Brown argue that the government affirmatively misled him in his Plea of Guilty and Judgment?

Certainly the merits favor Brown. The government told Brown, for instance, that only the prosecutor would seek restitution, and, since the prosecutor may only seek restitution under sections 1-6 of RCW 9.94A.753, that misled Brown. If the Court reaches the merits, Brown will win.

The procedural issue is closer, at least at first glance. But Brown can make his merits argument. When the government affirmatively misleads a defendant, it raises due process issues that may be raised for the first time on appeal. The error here was constitutional and manifest. The Court should reach the merits, find that Brown was misled, and reverse the restitution order.

A. Brown was ordered to pay restitution under section 7 although his plea and judgment told him he faced payment only under sections (1)-(6)

Adonis Brown's case was resolved by a plea agreement. His statement on plea of guilty referenced restitution, but did so in a way that misled Brown to believe that he would not be subject to a restitution order

under subsection 7 of the Restitution Statute, RCW 9.94A.573. The Statement used language that does not apply to subsection 7 (CP 47); stated that only a prosecutor would move for restitution (CP 49); and stated that the amount of restitution would be determined by the judge rather than an administrative agency (CP 49). The judgment and sentence similarly misled Brown. The judgment told Brown that he would be subject only to an agreed restitution order (CP 64).

None of these things were true. An administrative agency moved for restitution, not the prosecutor. The agency moved under subsection 7, told the court what the amount was, and Brown never agreed to the restitution. Because the plea and the judgment affirmatively misled Brown about restitution, the restitution order must be reversed.

B. **Brown raises a manifest constitutional error that can be reviewed for the first time on appeal**

As Brown pointed out in his opening brief, since the government affirmatively misled him, he raises a due process issue of the kind that courts of appeals can review. Brown opening brief at 9, citing *State v. Minor*, 162 Wn. 2d 796, 174 P.3d 1162 (2007).

This case has "a manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

When determining whether to review a case under RAP 2.5(a)(3), the Court asks "two questions: (1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?" *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015).

Brown shows an error of constitutional magnitude. Our courts have looked at "waived" issues where the government affirmatively misled a defendant. *Minor*, 162 Wn.2d 796. Affirmatively misleading a defendant violates due process. *Id.* at 805 (Madsen, J., concurring), citing *State v. Sweeny*, 125 Wn. App. 77, 83 (2005). Since Washington courts have repeatedly found that due process is violated where the government affirmatively misleads a defendant, Brown raises a constitutional issue.

The issue is manifest because it is clear from the record and prejudices Brown. The imposition of restitution under a provision that Brown was told would not be used shows actual prejudice. *Kalebaugh*, 183 Wn.2d at 584) (holding that manifest error must show actual prejudice).

The error is plain from the record. The argument here turns only on the papers—the judgment and the plea agreement. In reviewing the documents, this Court is in the same position as the trial court, because the trial court did not make any credibility determinations.

As a practical matter, and unlike an evidentiary issue, Brown's failure to argue he was affirmatively misled did not change the course of proceedings. And there is no prejudice to the government, which has had a full opportunity to brief the issue before this Court. While a timely objection below on the exact grounds offered here would have led to a ruling for Brown, that ruling would likely have been appealed by the government and we would be in virtually the same position, with the only difference that the government would face the burden on appeal.

The issue here only requires interpretation of the papers: does it matter that the government told Brown that he would be subject to restitution only under sections 1-6?

C. Brown properly preserved his objection to restitution under Section 7

In the trial court, Brown twice objected to restitution being order under RCW 9.94A.573(7). The first objection was successful. CP 86 (court denying restitution under section 7s when motion brought by prosecutor). The Department then moved for restitution, under the same provision, section 7, that the trial court had denied.

A restitution hearing was held on February 17, 2017. CP 101-02.

The Department argued that, because its petition was brought within a year and the victim was entitled to benefits, the court had a mandatory duty to award restitution. RP 3. Trial counsel, having won the issue once, only had a couple of days to prepare for the February hearing. RP 5 ("just received it at the beginning of the week, Your Honor"). He submitted no briefing.

Brown's counsel made two arguments. First, he argued that the court lacked jurisdiction under section 7, and the Department's claim should have been brought under a new cause number. RP 7. Counsel could not cite a case to support that proposition. RP 7. Counsel insisted that the petition needed to be filed "within 180 days." RP 7-8. Since the 180-day time limit applies to sections 1-6, that was an argument that restitution under section 7 was improper. Trial counsel also pointed out that Brown does not, and never will, have the ability to pay the restitution, RP 10, an argument that is not pursued on appeal.

D. **This Court can also review the issue on prudential grounds**

RAP 2.5(a) states that an appellate court "may" refuse to review a claim of error not raised in the trial court. This rule allows, but does not require, the Court to refuse to review certain claims that an appellant

failed to raise below. *State v. Osborne*, 140 Wn. App. 38, 41, 163 P.3d 799 (2007). The Court retains discretion under RAP 2.5(a) to consider an issue raised for the first time on appeal. *Osborne*, 140 Wn. App. at 41, 163 P.3d 799.

This issue here is akin to the post-trial issue reviewed for the first time on appeal in *Kindell*. *State v. Kindell*, 181 Wn. App. 844, 850, 326 P.3d 876 (2014). Like a post-trial issue, reviewing the issue here would not interfere with the trial process. Instead, review would ensure that the process under which Brown was ordered to pay restitution conformed to the Constitution.

E. **On the merits, Brown was affirmatively misled about restitution by the language of his statement on plea of guilty and his judgment and sentence**

In the statement on plea of guilty, Brown acknowledged that if the crime resulted in an injury to a person, "the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate." CP 47. The Statement also indicated that the "amount of restitution may be up to double my gain or double the victim's loss." CP 47.

The language regarding "extraordinary circumstances" and "doubling" a gain or loss is found in subsections 753(3) and (5). This led

Brown to believe that restitution would be ordered under 753(3) and (5), not 753(7).

Other language in the statement reinforces this interpretation. The only change to the boilerplate language regarding restitution on the form was to add that the "prosecuting attorney" would recommend "Restitution if any by later order or the court." CP 49. Since the prosecutor is only involved under subsections(1)-(6), this change to the boilerplate language led Brown to believe that restitution was only contemplated under (1)-(6).

Under subsection 7 , "the department of labor and industries, as administrator of the crime victims' compensation program, may petition the court within one year of entry of the judgment and sentence for entry of a restitution order." RCW 9.94A.753(7). Since, in the statement, only the prosecutor was designated to seek restitution, the statement not only did not give Brown any notice that he might be subject to a restitution claim by the Department, and it led him to believe that restitution would not be sought under another section.

The Department's argument to the contrary is unconvincing. First, the Department argues that, since it was not party to the plea agreement, it is not bound by it. Government brief at 12. But the case the Department

cites does not support that proposition. *State v. Barber*, 152 Wn. App. 223, 229, 217 P.3d 346 (2009), aff'd, 170 Wn.2d 854, 248 P.3d 494 (2011). In *Barber*, the question was whether the trial court was bound by the plea agreement. *Id*. at 227. Black letter law instructs that the government, not the trial court, must abide by the plea agreement. *Id*. But unlike *Barber*, here the trial court (in the judgment) and the government (in the plea) misled Brown. Since the trial court misled Brown, this case is like *Minor* not *Barber*.

The United States Supreme Court has rejected the attempt the Department is making here to divide up the various government parts and then infringe on a defendant's rights. In the Sixth Amendment context, the courts must "impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual." *Michigan v. Jackson*, 475 U.S. 625, 634 (1986), overruled on other grounds by *Montejo v. Louisiana*, 556 U.S. 778 (2009). *See also State v. Valdez*, 82 Wn. App. 294, 297, 917 P.2d 1098 (1996) (replying on state actor theory in *Jackson*).

Nor is the Department correct about the maxim ejusdem generis. Department brief at 15-16. The prosecutor and the trial court both used specific language that only applies to sections 1-6. Either could have added

the "Department of Labor and Industry" or similar language to their annotations, but instead told Brown that only the prosecutor would seek restitution. CP 49. It is not surprising that in the long paragraph on this issue starting on the middle of page 16 of the Reply the Department does not cite any cases in support of its argument that the maxim does not apply here. There is no doubt that it can apply to documents other than statutes. *In re Weissenborn's Estate*, 1 Wn. App. 844, 847, 466 P.2d 536 (1970) (applying maxim to will). Since the plea agreement and the judgment both call out specific parts of the restitution statute, the only natural reading is that it is those specific parts of the statute that apply.

The Department then argues that nothing in the plea agreement or judgment prevented the Department from seeking restitution. Department brief at 18. But that just circles back to an argument about what Brown was told. Brown was told in the judgment and the plea agreement that restitution might be sought, but was told in language that does not apply to subsection 7; was told that only a prosecutor would move for restitution; and was told that that the amount of restitution would be determined by the judge rather than an administrative agency. The judgment told Brown that he would be subject only to an agreed restitution order. Telling Brown these specific things necessarily misled him, and there would be no reason

to use the specific language unless the parties and court intended Brown to understand that the specific language applied. Judgments are precise because the rights of defendants depend on their language, and Brown is correct to assert that the actual language used controls.

F. **The Court should not assess costs against Brown**

The government is requesting costs. Department brief at 19. The Department cites no specific reason for imposing costs other than that Brown challenges the restitution order and the Department disagrees with that challenge. The trail court found Brown indigent. CP 111-12. He is therefore presumed indigent throughout the appeal. RAP 14.2; RAP 15.2. When he is released, he will have spent his entire adult life in prison. If he does not prevail, he will already owe a debt of restitution that he will probably never be able to pay. As the trial court stated, if it could consider the ability to pay, it would "almost never order restitution." RP 11. Imposing additional costs on Brown will only make his reentry more difficult. The Court should not assess costs against him.

CONCLUSION

This Court should reverse the imposition of restitution against Brown.

RESPECTFULLY SUBMITTED November 22, 2017.

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DECLARATION OF SERVICE

I declare that on November 22, 2017, I filed Appellant's reply brief with the Court of Appeals for Division II via Electronic Filing for the Court of Appeals (Division II), which served for Pierce County at PCoatecf@co.pierce.wa.us and the Department at

I further declare that on November 22, 2017, I served by U.S. mail a copy of the brief on Adonis Brown at:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated November 22, 2017, in Seattle, Washington

s/ Harry Williams IV

Harry Williams IV, WSBA # 41020

LAW OFFICE OF HARRY WILLIAMS LLC

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